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Nos. 94-977 and 94-6963

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# In the Supreme Court of the United States

OCTOBER TERM, 1994

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BRENDA TUCKER, PETITIONER

*v.*

UNITED STATES OF AMERICA

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BARBARA MCDONALD, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

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## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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DREW S. DAYS, III
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Petitioners contend that the court of appeals erred in reversing the order of the district court dismissing the indictment in this case.

1. On September 22, 1992, petitioners were indicted by a grand jury sitting in the United States District Court for the Western District of Tennessee. They were charged in five counts with purchasing, and aiding and abetting the purchase of, food stamps, in violation of 7 U.S.C. 2024(b)(1). The indictment arose out of a "reverse sting" operation in which the Department of Agriculture hired Linda Hancock to catch people who buy food stamps below face value, abusing the food stamp system. In November 1990, Hancock sold food stamps to petitioners after she claimed she was in dire financial need. 94-977 Pet. App. 1a-3a.

On June 2, 1993, accepting the recommendation of a magistrate, the district court granted petitioners' motion to dismiss the indictment on the ground that the government's conduct in employing Hancock to induce criminal activity in persons who were not otherwise suspected of engaging in crimes was so outrageous that it violated their due process rights. 94-977 Pet. App. 1a-2a.

The court of appeals reversed. 94-977 Pet. App. 1a-23a. The court held that "outrageous" government conduct that induces a defendant to commit a crime does not violate due process; that the district court lacks authority to dismiss an indictment on due process grounds; and that such a remedy would violate the constitutional separation of powers. The court further concluded that the question whether petitioners were entrapped must be resolved by the jury. *Id.* at 6a-21a.

2. Petitioners contend (94-977 Pet. 11-29; 94-9463 Pet. 12-26) that due process may bar a criminal prosecution because of outrageous conduct by government agents. Petitioner McDonald also contends (94-9463 Pet. 27-31) that the court of appeals erred in concluding that the language in its prior cases recognizing a due process

defense based upon outrageous government conduct was mere dicta. Whatever the merits of petitioners' contentions, they are not presently ripe for review by this Court. The court of appeals' decision places petitioners in precisely the same position they would have occupied if the district court had denied their motion to dismiss. If petitioners are acquitted following a trial on the merits, their contentions will be moot. If, on the other hand, petitioners are convicted and their convictions are affirmed on appeal, they will then be able to present their contentions to this Court, together with any other claims they may have, in a petition for a writ of certiorari seeking review of final judgments of conviction. Accordingly, review by this Court of the court of appeals' decision would be premature at this time.*

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

DREW S. DAYS, III
*Solicitor General*

DECEMBER 1994

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* Because this case is interlocutory, we are not responding on the merits to the questions presented by the petitions. We will file a response on the merits if the Court requests.